In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 779

PERLEY M. LEWIS AND MILDRED C. LEWIS, PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Secretary of the Interior's opinion (App. A, *infra*, pp. 7–8) is not reported. The district court's findings of fact and conclusions of law (Pet. Ex. 1, pp. 26–33) are not reported. The opinion of the court of appeals (Pet. Ex. 3, pp. 36–41) is reported at 427 F.2d 673.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1970. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari through

406-537—70

September 30, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior had authority to reject petitioners' proposed exchange of privately owned lands for public lands under the Taylor Grazing Act once the deed for petitioners' lands had been tendered.

STATUTES AND REGULATION INVOLVED

The statutes and regulation involved [1] are set forth in Appendix B, *infra*, pp. 9–10.

STATEMENT

This is a suit to review a decision of the Secretary of Interior rejecting a proposed exchange of lands. Petitioners applied to the Secretary to exchange certain lands they owned for federal lands under Section 8(b) of the Taylor Grazing Act, 43 U.S.C. 315g(b). Such exchanges are authorized "When public interests will be benefited * * *." Applicable regulations provide that a proposed exchange may be rejected at any time prior to issuance of a patent, or title, to the land, and that actions taken in connection with the proposal up to that point create no contractual rights and convey no title. Petitioners completed all acts required

[1] Section 8(b) of the Taylor Grazing Act, 48 Stat. 1272, as amended, 43 U.S.C. 315g(b); Section 6 of the Act of April 28, 1930, 46 Stat. 257, as amended, 43 U.S.C. 872; 43 C.F.R. (1954 rev.) 146.3(b).

of them to qualify for the proposed exchange, including conveyance of their land to the United States. The local Land Office found that the proposed exchange was in the "public interest," but appeals by another applicant for the same public lands and resulting administrative proceedings delayed processing of the proposal for some time. During this period, in 1961, the Secretary adopted a policy limiting exchanges to cases in which "compelling reasons" could be shown for acquiring the proffered lands. After a second remand to the Land Office, petitioners' proposed exchange was rejected under the new test. The Director and the Secretary affirmed that rejection, and the United States tendered to petitioners a quitclaim deed for the land which they had conveyed to it.

On cross-motions for summary judgment, the district court held the Secretary's action to be within his authority and discretion. The court of appeals affirmed, concluding that "the determination of 'public interest' is one 'by law committed to agency discretion' and therefore unreviewable" under the Administrative Procedure Act, 5 U.S.C. (Supp. V) 701–706.

ARGUMENT

1. The regulation involved, 43 C.F.R. (1954 rev.) 146.3(b),[2] expressly provided that "until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed, and the applicant has no contractual or

[2] The regulation is now substantially repeated in 43 C.F.R. 2244.1–4(a).

other rights against the United States * * *." There can be no serious question that this regulation was valid and binding on petitioners. Nothing in the Act suggests that such a precautionary regulation is beyond the discretionary authority granted the Secretary. Quite to the contrary, the Act merely authorizes and does not direct the Secretary to effect exchange. As the court of appeals observed (Pet. Ex. 3, p. 40), "[T]he Act does not circumscribe the manner in which the exchange is to be consummated" and "This lack of direction implies that the terms and conditions * * * fall within the Secretary's general rule-making power * * *." Indeed, Section 2 of the Act, 43 U.S.C. 315a, expressly directs the Secretary to issue rules and regulations to accomplish its purposes. It follows that neither the government's acceptance of petitioners' tender of their lands nor the subsequent administrative proceedings vested in petitioners any rights to public lands; the Secretary had full authority to reject their proposed exchange of lands up until the moment when a patent "is issued." (43 C.F.R. (1954 rev.) 146.3(b), *supra*).

This conclusion is buttressed by the authority given the Secretary—and exercised in this case—to return land deeded to the United States in connection with an exchange application when the proposal is "thereafter withdrawn or rejected * * *." Section 6, Act of April 28, 1930, 43 U.S.C. 872. Moreover, the policy of the statute and the regulation was fairly applied in this case. Petitioners' proposed exchange was rejected because there were no "compelling reasons to acquire the offered lands to augment long-range Federal Resource Man-

agement programs" and petitioners did not show "that the consummation of the exchange would otherwise benefit the public interest" (Pet. Ex. 1, pp. 31, 32). Benefit to the public interest was the statutory criterion before as well as after the [illegible] policy statement.

2. There is no conflict with any decision of this Court or of the courts of appeals. The court of appeals properly distinguished cases such as *Payne* v. *New Mexico*, 255 U.S. 367. Those cases arose under statutes *requiring* disposal of public lands when specified conditions had been met; in effect, Congress exercised the power to dispose of public property and conferred no discretion on the Secretary to refuse to exchange lands. While the Secretary was given discretion to determine which public lands should be exchanged, the statute conferred a clear right to some exchange. In this context, the Court held that a proposed exchange, once accepted, could not subsequently be undone by a refusal to patent the government lands. But here there was never an obligation to exchange, and so the Secretary remained free to reject the proposal. See *Ferry* v. *Udall*, 336 F.2d 706, 711–714 (C.A. 9), certiorari denied, 381 U.S. 904; *Willcoxson* v. *United States*, 313 F.2d 884, 887–888 (C.A. D.C.), certiorari denied, 373 U.S. 932.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALTER KIECHEL, JR.,
Acting Assistant Attorney General.
EDMUND B. CLARK,
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Attorneys.

NOVEMBER 1970.

APPENDIX A

United States Department of the Interior, Office of the Secretary, Washington 25, D.C.

A–29572
Private Exchange
Arizona 016558

JUNE 27, 1963.

DEAR MR. LEWIS: I have considered your letter of April 17, 1962, wherein you have appealed to the Secretary of the Interior from a decision dated February 21, 1962, by which the Director, Bureau of Land Management, affirmed a decision of the Land Office at Phoenix, Arizona, rejecting your private exchange application (Arizona 016558), because there were no compelling reasons to acquire the offered lands to augment long-range Federal resource management programs and the exchange would not, therefore, be in the public interest.

You contend on appeal, among other things, that (1) you have complied with all requirements, including the conveyance in October 1959, of the offered land to the United States by warranty deed, to complete the exchange, and have earned and are entitled to a final certificate to the selected land, and (2) you would have no quarrel with the Bureau of Land Management had it, in 1959, or at any time during the ensuing two and one half years, decided to refuse to issue cash certificate and patent to the selected land, on the ground that the government had need of, and a use for, the said selected land, or that disposal thereof would injure the government.

Section 8(b) of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g(b)), authorizes the Secretary of the Interior to accept privately-owned land in exchange for not to exceed an equal value of public land when public interests will be benefited thereby. The determination as to whether the public interest will be benefited is a matter committed wholly to the discretion of the Secretary.

After full consideration of your reasons for appeal and upon careful review of the record, I find that there are no compelling reasons to justify acquiring the 388.73 acres offered in your proposed exchange, notwithstanding the fact that you have conveyed title thereto to the United States; nor is there any substantial or positive evidence that the consummation of the exchange would otherwise benefit the public interest.

I conclude that the rejection of your exchange application was consistent with the facts and was entirely proper.

Therefore, the decision appealed from is affirmed.

The case is remanded to the Director, Bureau of Land Management, who will, in due course, return the evidence of title to the offered land to you, and will cause to be issued a quit claim deed for the land conveyed to the United States, pursuant to Section 6 of the Act of April 28, 1930 (46 Stat. 257; 43 U.S.C. 872).

Sincerely yours,

(Sgd) JOHN A. CARVER, JR.
Assistant Secretary of the Interior.

Mr. Perley M. Lewis
213 North First Avenue
Room 17, Lower Floor
Phoenix 3, Arizona

APPENDIX B

STATUTES AND REGULATION INVOLVED

Section 8(b) of the Taylor Grazing Act, 48 Stat. 1272, as amended, 43 U.S.C. 315g(b), provides:

> When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

Section 6 of the Act of April 28, 1930, 46 Stat. 257, as amended, 43 U.S.C. 872, provides:

> Where a conveyance of land has been made or may hereafter be made to the United States in connection with an application for amendment of a patented entry or entries, or an exchange of lands, or for any other purpose, and the application in connection with which the conveyance was made is thereafter withdrawn or rejected, the Secretary of the Interior or such officer as he may designate is authorized and directed, if the deed of conveyance has been recorded, to execute a quitclaim deed of the conveyed land to the party or parties entitled thereto.

43 C.F.R. (1954 rev.) 146.3(b) provides:

> The authorized officer, if he has no basis to determine that the value of the selected land

exceeds the value of the offered lands, that the exchange is not in the public interest, or that there is other reason not to do so, shall direct publication of the notice of exchange in the newspaper or newspapers designated by him, and require the applicant to submit proof of publication and comply with the provisions of §§ 146.4, 146.5 and 146.7. However, until patent to the selected land is issued, the authorized officer may at any time determine that the exchange should not be completed, and the applicant has no contractual or other rights against the United States, and no action taken will create any contractual or other obligation of the United States other than an obligation to pay one-half the cost of publication.

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